

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ROBERT WHARTON)	01-CV-6049
)	
Petitioner)	
vs.)	
)	
DONALD T. VAUGHN)	
)	
)	Philadelphia, PA
)	February 12, 2021
Respondent)	1:10 p.m.

MOTIONS IN LIMINE HEARING VIA AUDIOCONFERENCING
BEFORE THE HONORABLE MITCHELL S. GOLDBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Amicus:

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1 (Clerk opens court at 1:10 p.m.)

2 THE COURT: Good afternoon. This is Mitch Goldberg.
3 Who is on the line for the attorney general?

4 MR. BARKER: This is Jim Barker, and Cari Mahler is
5 also on the line, Your Honor.

6 MS. MAHLER: Good afternoon, Your Honor.

7 THE COURT: Hello.

8 And for Mr. Wharton?

9 MS. McHUGH: Good afternoon, Your Honor, Elizabeth
10 McHugh.

11 MS. VAN WYK: And Claudia Van Wyk also for
12 Mr. Wharton. Good afternoon.

13 THE COURT: Good afternoon.

14 And for the district attorney?

15 MR. GEORGE: This is Paul George.

16 MS. WINKELMAN: Good afternoon, Your Honor. Nancy
17 Winkelman is also on.

18 THE COURT: Who was the first one?

19 MR. GEORGE: Paul George.

20 THE COURT: Good afternoon.

21 And court reporter?

22 THE COURT REPORTER: Hello, Your Honor. This is
23 Shannan Gagliardi.

24 THE COURT: My staff, Mr. Sonnie and Samantha, are
25 you on?

1 THE DEPUTY CLERK: Yes, Judge.

2 THE LAW CLERK: Yes, Judge.

3 THE COURT: Okay. We are going to just chat about
4 some motions in limine. We have a hearing coming up on the
5 18th to be sort of bifurcated. I've taken a closer look at
6 these. A couple observations that I think can inform our
7 discussion.

8 One is that I think a lot of the objections raised --
9 not objections, issues raised particularly by the attorney
10 general are more trial-specific, and I'll get to those and I'll
11 explain what I mean when we get to them. But a lot of them
12 are, I think, asking me to decide things out of context before
13 I really heard what the witnesses are going to say. They are
14 sort of like preemptory objections.

15 I think the lawyers should remember that there's no
16 jury. This is a hearing on the remand from the Third Circuit.
17 So we can allow testimony to come in, I can hear objections. I
18 can think about things in context, and then if I agree with an
19 objection later, I can always exclude it and not consider it.
20 So that's just, you know, an overview of what I was thinking
21 about some of the things raised.

22 As far as the first issue, which I'm going to
23 characterize as the relevant time period we're talking about --
24 and, again, for the record and in context, the remand is on the
25 issue of whether there was a constitutional lapse by trial

1 counsel, Mr. Cannon, in the death penalty phase of this
2 proceeding whereby he provided ineffective assistance of
3 counsel for not presenting evidence of positive prison
4 adjustment on Mr. Wharton's behalf that could have been
5 considered by a jury for mitigation purposes. That was, if I
6 think I have it right, the directive of the Third Circuit.

7 And I think there's a dispute over what the relevant
8 time period is for that, we'll call it, behavior analysis. I
9 want to make sure I have dates right. The first, I think
10 verdict, I think verdict, where a jury said the proper penalty
11 was death, was July 5, 1985. There was a reversal in the state
12 courts and the second verdict. So there's a retrial on the
13 penalty phase, and the second date of the second death penalty
14 verdict was December 14, 1992. And the date of arrest since
15 Mr. Wharton has been in custody is February 7, 1984.

16 Do I have those dates right, Ms. McHugh?

17 MS. MCHUGH: Yes, Your Honor. The only one I was
18 checking was the date of the second verdict. I know it was
19 December of '92, but I don't know the exact date.

20 MS. VAN WYK: This is Ms. Van Wyk. I think it was
21 December 23. It was right before Christmas. But it's
22 approximately correct.

23 THE COURT: 14th, 23rd, December of 1992. Thank you.

24 So I would then ask counsel for Mr. Wharton then, you
25 have the burden of presenting your case on ineffectiveness.

1 What are you going to argue is the operative dates?

2 MS. VAN WYK: This is Ms. Van Wyk. I mean, we agree
3 with the Court's suggestion the other day that, you know,
4 perhaps this is more properly viewed as a question about what
5 would be proper rebuttal. And Your Honor just indicated the
6 claim has to do with counsel's failure to develop and present
7 evidence of prison adjustment, and it's not really clear to us
8 how the state would rebut that evidence.

9 THE COURT: Well, we can make it clearer if you would
10 tell us what is it -- if I understand your position, you're
11 going to say, Judge Goldberg, you need to find that there was
12 ineffective assistance of counsel here, and the reason is
13 because Mr. Cannon dropped the ball and didn't present prison
14 conduct information.

15 Do I have that right so far?

16 MS. VAN WYK: Yes, that's right so far.

17 THE COURT: So my question is, during what time
18 period are you going to argue that he should have presented
19 that information? Because that informs me and the AG's office,
20 you know, how to respond. So what are you going to do? I'm
21 asking for an offer of proof.

22 MS. VAN WYK: We are going to prove his conduct upon
23 his arrival in the state prison system, which happened almost
24 really over a year after his original sentencing by the jury in
25 September of 1986. Is that right? Yes. July '85 was the jury

1 verdict. The escape was April 1986. But the claim centers on
2 the record of how he conducted himself in the prison beginning
3 when he arrived there starting with his first program review
4 committee reports describing how --

5 THE COURT: Excuse me. Where was he from -- just
6 logistically, where was he from the date of the second verdict
7 of death, which we say is either the 14th or the 23rd, where
8 was he from that date -- I'm sorry. One second. Where was
9 he -- you're saying 1986.

10 So where was he in between the first verdict of
11 death, July 5, 1985, until 1986?

12 MS. VAN WYK: He was mostly, I believe, in Eastern
13 State Penitentiary. He had some outstanding -- he had some
14 burglary charges, and they were all burglary with other crimes.

15 THE COURT: Okay. Why are you not including that
16 time period?

17 MS. VAN WYK: Because the claim relates to his
18 adjustment to his prison sentence.

19 THE COURT: But he was in prison.

20 MS. VAN WYK: He was certainly incarcerated, that's
21 correct, Your Honor.

22 THE COURT: So why are you limiting -- if he was
23 incarcerated in 1984 -- I just want to understand why you're
24 picking the date you're picking in the timeline. So he's
25 incarcerated in 1984. He is given a first death penalty

1 sentence in July of 1985, but you're picking 1986. I don't
2 understand why you're picking that date.

3 MS. McHUGH: Your Honor, this is Ms. McHugh, if I
4 could just interject one fact. The incarceration records from
5 the Philadelphia County, which was where he was, we don't have.
6 So the records that were proffered in state court as part of
7 the claim were the ones that were proffered. You know, I don't
8 know what the thinking was behind that, but that's the records
9 that are in front of us that we have to prove the positive
10 adjustment.

11 THE COURT: Understood. Could you give me a month,
12 if possible, in 1986?

13 MS. McHUGH: That he went to the state prison? I
14 think it's the 5th of September. It's September.

15 THE COURT: I'm talking over you so I apologize.
16 Let's try not to talk over people.

17 MS. VAN WYK: I apologize.

18 THE COURT: I'm doing it too. An apology not
19 necessary. I'm doing it because I just want to understand your
20 thought process.

21 So let me understand this. Mr. Wharton is going to
22 argue that there was a constitutional violation on the part of
23 Mr. Cannon for not presenting positive prison records, and
24 you're starting in September 1986. And when the fact finder,
25 me, asks why are you starting on that date, you're saying

1 that's the first date that we can obtain records. We
2 understand he was in jail since February of 1984, but we're
3 starting in '86 because that's when the records were available.

4 Is that accurate?

5 MS. VAN WYK: That's part of it, Your Honor.

6 MS. McHUGH: That's accurate, Your Honor. This is
7 Ms. McHugh. That's accurate with one caveat. Whether or not
8 there were additional records available back then, I don't
9 know, but that's the records that we have now to prove in this
10 court.

11 THE COURT: Okay.

12 MS. VAN WYK: May I add one further thing, Your
13 Honor?

14 THE COURT: Who is speaking?

15 MS. VAN WYK: I'm sorry. This is Ms. Van Wyk again.

16 The claim is that he underwent a process of
17 adjustment, and so the demonstration is through the records
18 that were accumulated over the time that he was incarcerated in
19 the state prison.

20 THE COURT: Got it. Okay. And the rub of this, to
21 get to, I think, where this is all being driven, does everyone
22 agree -- I'm trying to find maybe someone who could help me.

23 What's the date of the escape?

24 MS. VAN WYK: April '86, Your Honor. I think the
25 21st.

1 THE COURT: Thank you. April 21st, '86.

2 So what the defense is trying to avoid then -- if I
3 understand the defense's argument, Mr. Wharton's argument, is
4 we are only going to present good behavior starting in
5 September of 1986. The escape -- and I'm putting aside for
6 purposes of my question if the escape is allowed into evidence,
7 to what extent we'll get into the facts.

8 But your argument, Ms. McHugh and Ms. Van Wyk, is the
9 escape occurred prior to September of 1986. It's our case. We
10 only want -- we dictate the timeline. We're starting
11 September 1986. The escape was before that and, therefore,
12 excluded.

13 Is that your argument? You have to pick one person
14 to argue for Mr. Wharton.

15 MS. McHUGH: I apologize. I'll let Ms. Van Wyk do
16 it.

17 THE COURT: Okay. Go ahead.

18 MS. VAN WYK: The other piece of it, Your Honor,
19 is --

20 THE COURT: Could you answer my question? Before you
21 tell me the additional piece, do I have the first part right?
22 Is that your argument?

23 MS. VAN WYK: That is our argument with an addition.

24 THE COURT: Go ahead.

25 MS. VAN WYK: We also would contend that how he

1 behaved during his, you know, being taken out of court is only
2 of questionable relevance to how he adjusted in the prison.
3 Just as, you know, if he had been disrespectful to the judge at
4 the sentencing on the robbery that he was sentenced on that
5 day, that would have limited relevance to how he would adjust
6 within the confines of a prison.

7 THE COURT: Understood. Got it.

8 I'm still asking questions of defense counsel.
9 Hypothetically, we're at death penalty trial, and Mr. Cannon
10 hypothetically acts, according to you, in a constitutional
11 manner as he should have and he introduces records indicating
12 positive adjustment from September of 1986 forward to the date
13 of the hearing. And since we're dealing with two hearings, I
14 guess we're talking about all the way up to 1992.

15 And then in rebuttal, if the DA's Office wanted to
16 introduce the escape that occurred in April of 1986, you would
17 object and you would say that that would be inadmissible for
18 two reasons. One, it predates 1986 and, two, it's an escape
19 that occurred for a case. It's not a prison adjustment. I'm
20 just repeating back to you what I think your argument is.

21 Is that right?

22 MS. VAN WYK: Yes, Your Honor.

23 THE COURT: Okay. I understand your argument. Let
24 me hear from the attorney general.

25 MR. BARKER: Your Honor, this is Jim Barker. First,

1 to clarify one thing, Mr. Wharton went into the Department of
2 Corrections on May 2nd of 1986. After the escape attempt, I
3 guess prison officials in Philadelphia --

4 THE COURT: Hold on. You're saying he went into the
5 state prison system in May of '86, but then you say they only
6 have records since September.

7 Is that the difference between the May and the
8 September date?

9 MR. BARKER: That could very well be. I know that
10 after the escape attempt, Philadelphia prison officials sent
11 him over to Graterford. He was kept there until September.
12 After September, he was moved to -- excuse me. I'm sorry. I'm
13 looking at someone's timeline. He was moved in September to
14 Huntingdon.

15 THE COURT: Go ahead.

16 MR. BARKER: So those are the records we have.
17 Actually, from May until September he was in Graterford.

18 THE COURT: Go ahead.

19 MR. BARKER: Our argument would be this claim was
20 brought under Skipper, which was actually a pretrial detention
21 status. So adjustment to prison life starts from the day that
22 you go into the prison generally, and that would include
23 whether you're being held in a county jail, whether the police
24 have you in a jail cell. Whatever it is, your adjustment
25 starts from that first day.

1 And even if the Court were to for whatever reason go
2 with September, it really doesn't make sense to exclude the
3 escape because that's the reason for the repeated statement
4 that Mr. Wharton is an escape and assault risk. So it's still
5 relevant, and the details of it explain all of that. It also
6 puts into context the misconducts relating to the finding of
7 the handcuffs, the improvised handcuff key, which I guess now
8 is disputed. But it explains all that.

9 And so we would say that it's relevant one way or the
10 another, but actually the relevant time period begins from the
11 moment he's taken into custody because that's the time he
12 starts adjusting to custody.

13 THE COURT: Mr. George or Ms. Winkelman, do you want
14 to be heard on this issue?

15 MR. GEORGE: Judge, I would only say that if the
16 claim of the defendant is that as of a certain date I became a
17 good prisoner and that's a mitigating factor, then what's
18 relevant is his conduct as of the date that he claims that he
19 became well-adjusted.

20 THE COURT: Mr. George, if there was no evidence
21 presented at trial by Mr. Cannon, would the DA's Office
22 independently be allowed to introduce, in your view, the escape
23 information as part of his proof on aggravating circumstances?

24 MR. GEORGE: To me that would depend on if it was
25 potentially admissible to rebut evidence of good character of

1 some other kind. Then it could be that it might have some
2 relevance, and it could potentially be introduced in that
3 context.

4 Whether or not it rebuts a claim that as of a certain
5 date a defendant, or rather an incarcerated person, became a
6 good prisoner, adjusted to prison life, whatever it might be, I
7 would think that it would be admissible for that purpose.

8 THE COURT: So is your view that the Commonwealth,
9 the DA's Office, your office, I realize we're reverting back a
10 lot of years, but a DA in the general sense in a death penalty
11 case is only allowed to introduce evidence of aggravating
12 circumstances in rebuttal to mitigating evidence? You're not
13 saying that.

14 MR. GEORGE: Certainly not. You can put in evidence
15 of aggravating circumstances as part of your case in argument
16 for execution. The question, as I understand it, is if certain
17 mitigating evidence was introduced, are you able to introduce
18 evidence to rebut it? And the answer would be yes.

19 If this escape fits into one of the aggravating
20 circumstances, and certainly there are plenty of them in
21 Pennsylvania, then it would be admissible, in my view, in the
22 Commonwealth's case in chief in the penalty phase.

23 If it was going to be introduced to say, no, you
24 didn't have good adjustment as of a certain date as you claim,
25 then I think bad behavior before that date does not rebut the

1 defendant's claim.

2 THE COURT: Got it. I understand your position.

3 Thank you.

4 Okay. I am -- and the luxury, again, of this being a
5 bench proceeding, not a jury, is I can always rethink this,
6 change my mind. You know, I'm sure the lawyers will respect
7 the sanctity of my ruling, but talking out the other side of my
8 mouth, they can keep pressing this if they think that they need
9 to.

10 But I'm ruling that -- and I'm primarily basing my
11 ruling on the Skipper matter that says that we have to talk
12 about positive prison adjustment even going back to pretrial
13 detention. I'm ruling that the evidence of the escape is
14 admissible, and so the next question is to what extent does the
15 attorney general -- how do you plan to introduce this evidence
16 and how far do you intend to go with it?

17 MR. BARKER: Your Honor, we have submitted records
18 that substantiate it. We have the guilty plea colloquy, the
19 judgment of sentence, the docket.

20 THE COURT: Tell me what happened. I'm not saying
21 I'm going to allow all this in. I just want to know what
22 happened.

23 MR. BARKER: Well, what happened was Mr. Wharton was
24 brought in for sentencing on a separate matter, and as they
25 were leaving the courtroom, he had a cast on his wrist. He had

1 been claiming some sort of an injury. There is nothing in the
2 medical records thereafter to substantiate it, so we don't know
3 whether that was a legitimate injury or not.

4 Somehow he got out of his handcuffs and shoved the
5 deputy sheriff, who was escorting him, into an elevator door.
6 There were two deputies there. The one who was shoved was able
7 to get off two shots as Mr. Wharton was running down a set of
8 steps. He got out onto the street outside of City Hall.

9 THE COURT: Hold on. They were in -- he got his
10 handcuffs off. They were in, I guess, an elevator that takes
11 Mr. Wharton from, I guess, the general prison area in the
12 basement, I guess this is in City Hall, up to the courtroom.

13 And then at some point after or before the
14 proceedings did this occur?

15 MR. BARKER: It was after. It was when they were
16 returning to that area that Your Honor was talking about.

17 THE COURT: He was able to get out of his handcuffs.
18 He pushed the guards or one guard out of the way and ran out of
19 the elevator.

20 Where did he run, down the hall?

21 MR. BARKER: Your Honor, I don't think that they ever
22 got into the elevator. I think that they got to the elevator
23 when he shoved the deputy. So the deputy actually went and hit
24 the door of the elevator.

25 THE COURT: And Mr. Wharton ran.

1 MR. BARKER: He ran and made it to a stairwell. It's
2 difficult to tell when exactly the sheriff got his shots off,
3 but he fired twice and hit Mr. Wharton. Mr. Wharton kept
4 running after he was hit and made it out onto the street where
5 he collapsed, and that's where he was taken back into custody.

6 THE COURT: How much of any of that, starting with
7 the littlest bit being he attempted to escape in another
8 proceeding on April 21, 1986, all the way to having that full
9 story told, what extent do you believe is admissible for you to
10 introduce?

11 MR. BARKER: Well, I think all of the circumstances
12 that surround that would be relevant as to, you know, why he's
13 such an escape risk and whether he's actually adjusting to
14 prison life well.

15 THE COURT: Okay.

16 MR. BARKER: I would say that all of it.

17 THE COURT: All right. Let me hear from
18 Mr. Wharton's attorneys on that issue, that is, what evidence
19 is going to be allowed in on this issue.

20 MS. McHUGH: Your Honor, this is Ms. McHugh.

21 First of all, the charge that Mr. Wharton pled guilty
22 to as a result of this incident was escape only. He was
23 originally charged with implements of escape regarding a
24 handcuff key and assault, and those charges were nolle prossed
25 by the District Attorney's Office.

1 THE COURT: Those charges are inadmissible. They
2 were nolle prossed. They were charges that were never proven.
3 They are excluded.

4 MS. McHUGH: Okay.

5 MR. BARKER: Your Honor, I will have to go back and
6 look at that. I'm not sure that's correct. I believe what
7 happened was the aggravated assault was reduced to simple
8 assault.

9 THE COURT: Okay. Whatever it turns out to be,
10 charges that were brought and not proven either by way of a
11 jury verdict or a plea are not admissible, whatever those
12 charges are.

13 MS. McHUGH: And I would just add that in the AG's
14 exhibits, the bills of information, I believe it's somewhere
15 within Exhibits 7 through 10, they withdrew prosecution on
16 those two charges. Mr. Barker is correct that the aggravated
17 assault was dismissed, but that was at a preliminary hearing,
18 apparently, prior to the bills of information.

19 THE COURT: You guys will figure that out. Let's
20 just agree that he only pled to an escape, and that's the only
21 thing that's admissible.

22 So what's Mr. Wharton's lawyers' view on how much of
23 the facts underlying that escape conviction are allowed in?

24 MS. McHUGH: Well, our position, Judge, is that, you
25 know, there's a different version of this, and that's also

1 submitted in the AG's exhibits, which is Mr. Wharton's version
2 where he says that he was left unattended by the sheriffs and
3 that's how this incident, you know, how he was able to get
4 away. So there is this distinct factual dispute as to whether
5 there was any such handcuff key or shoving or anything of that
6 nature.

7 Also submitted in the AG's exhibits is evidence that
8 the sheriff's office was under attack at that point for having
9 multiple incidents like this happen, and so there would be a
10 reason for these sheriffs to possibly embellish the facts. So
11 without the ability to cross-examine the sheriff's officers,
12 which we know we cannot do because they are no longer
13 available, we would submit that any of the factual bases
14 substantiating those two charges that were dismissed and in
15 dispute, that that would not be admissible at a sentencing in
16 1992 and certainly would not be admissible at this hearing to
17 prove that that would have been evidence introduced in '92.

18 THE COURT: Mr. Barker, how do you intend to prove
19 that story that you said occurred?

20 MR. BARKER: Well, there are two ways to do it, Your
21 Honor. Mr. Wharton actually pled guilty, and if you look at
22 the guilty plea colloquy, he admitted the charges that were in
23 the criminal complaint. So the version of events was recited
24 in the affidavit that goes with the criminal complaint, and
25 that's what he pled guilty to.

1 THE COURT: Got it. Does the colloquy acknowledge --
2 does the colloquy have Mr. Wharton acknowledge that there were
3 underlying facts in the complaint and he's read them and adopts
4 them in some way?

5 MR. BARKER: Yes. He admits to the charges as they
6 are set forth in the criminal complaint, and both he and his
7 attorney signed that.

8 THE COURT: Understood.

9 Okay. Does the DA wish to be heard on this issue?

10 MR. GEORGE: No, thank you.

11 MS. McHUGH: Your Honor, I do have one response to
12 Mr. Barker. This is Ms. McHugh.

13 THE COURT: Go ahead, Ms. McHugh.

14 MS. McHUGH: I think that's actually very inaccurate
15 what he just represented to the Court. I looked at the guilty
16 plea colloquy and the charging documents. The affidavit that
17 he's referring to precedes the preliminary hearing and the
18 guilty plea. There is no factual basis for the guilty plea in
19 the record.

20 So when he signs the guilty plea form, there's no --
21 you know, as Your Honor's familiar with, when you do a guilty
22 plea, they will sometimes read the facts that you're pleading
23 guilty to and do you agree with that, as you mentioned. That's
24 not in the record here.

25 What we have is him simply signing the bills of

1 information, or the bill of information for the escape charge,
2 and you have a guilty plea colloquy that lays out his rights
3 for pleading guilty, which he signed. The factual basis for
4 the plea is not in the record. Any facts that were preceding
5 that were part of the complaint. That was the first document
6 generated in this case and is not reliable as to what he's
7 pleading guilty to.

8 THE COURT: Mr. Barker, in the submissions that you
9 have submitted, and I don't have all of them and the
10 attachments in front of me, in the submissions that you
11 submitted, are the documents there for me to find and look at
12 to support your argument that there's an adoptive admission?

13 MR. BARKER: Your Honor, I'll have to go back through
14 them in detail. At this point I don't want to make a
15 representation --

16 THE COURT: Okay. That's fair.

17 MR. BARKER: -- that I'm going to later regret.

18 THE COURT: That's fair. So do that. On this issue,
19 I've ruled that the escape is admissible. I've ruled that the
20 conviction is admissible.

21 On the issue of to what extent are the facts
22 underlying the escape admissible, that is going to depend on
23 whether the attorney general can tie up an adoptive admission.
24 By that I mean -- and, Mr. Barker, go back and look at the
25 documents and let us know by way of email, I guess, since we're

1 all operating remotely and obviously copy counsel. But if it's
2 not in there, let us know. I'll look at this.

3 For instance, traditionally, in Federal Court, which
4 I know is different than state court, I'll ask in a plea, here
5 are the facts, Mr. Defendant. Are they accurate? Yes. Are
6 you pleading guilty to those? Yes. That's an adoptive
7 admission. But if, as Ms. McHugh says, you can't tie that up,
8 then it will be different. So let's hold this issue under
9 advisement, and the issue being how far the facts can go.

10 MS. MAHLER: Your Honor, this is Cari Mahler. May I
11 just chime in for a moment? Since I have the guilty plea in
12 front of me, it might help clarify.

13 THE COURT: Go ahead, Ms. Mahler.

14 MS. MAHLER: Thank you, Your Honor.

15 Page 3 of the guilty plea colloquy specifically has a
16 section entitled "Facts of my case and elements of the crimes."
17 And it specifically states, "The facts of the case have been
18 read to me. The crimes and elements of the crimes have been
19 explained to me. I committed the crimes, and that is why I am
20 pleading guilty." It's signed by Robert Wharton.

21 THE COURT: Okay. Let me look at that. That's very
22 helpful. But I don't have it in front of me, so I'm going to
23 go back and look at that. Understood.

24 MS. MAHLER: Sure. Thank you.

25 THE COURT: Thank you.

1 All right. So it looks like the next issue is
2 documents, and if you'll give me about -- I got something I got
3 to deal with, and it will literally take me no more than two
4 minutes. Would everyone mind just staying on hold for two
5 minutes? I'll come right back to you. Will that work? I'll
6 be right back.

7 (Recess taken from 1:47 p.m. to 1:49 p.m.)

8 THE COURT: All right. I'm back. Sorry about that.
9 Let me just ask some questions on the next issue.
10 Could either Ms. McHugh or Ms. Van Wyk, could you remind me
11 where Dr. Krop fits into all of this?

12 MS. VAN WYK: That's my area, Your Honor.

13 THE COURT: Who is speaking?

14 MS. VAN WYK: I'm sorry. This is Ms. Van Wyk.

15 Dr. Krop is not a witness. He is not going to
16 testify, and we are not relying on his opinion as an
17 independent basis for our request for relief.

18 THE COURT: Could you go back a little bit and give
19 me the history? How does he fit into the whole scenario here?

20 MS. VAN WYK: Yes. When this petition began back in
21 the late 1990s, counsel for petitioner proffered prison
22 records, primarily the program review committee records and the
23 grievance records, along with the declaration from Dr. Krop,
24 all in support of the claim that trial counsel was ineffective.

25 We are not relying on -- oh, I'll step back.

1 Throughout the history of this litigation, because no hearing
2 was ever held, that factual proffer was the basis of the
3 various legal arguments that eventually came before this court
4 and went to the Third Circuit.

5 THE COURT: What was the proffer? What was he going
6 to say?

7 MS. VAN WYK: He was going to say that he had
8 reviewed materials, which he doesn't enumerate, and had
9 conducted an in-person evaluation with Mr. Wharton, did not
10 think he conformed to the criteria for antisocial personality
11 disorder and that he would make a good prison adjustment, and
12 he gave, you know, some examples from the record that supported
13 that conclusion.

14 THE COURT: Ms. Van Wyk, are any of your current
15 experts, who I understand to be Cynthia Link and Neil Blumberg,
16 are they going to reference Dr. Krop's opinions in any way?

17 MS. VAN WYK: Dr. Krop's declaration has been
18 provided to Dr. Blumberg as part of the history of
19 Mr. Wharton's contact with various mental health providers. He
20 also has the reports of several prison psychologists, including
21 a Dr. Saul.

22 THE COURT: I'm just asking about Dr. Krop.

23 MS. VAN WYK: Okay.

24 THE COURT: And my question is, is Blumberg's opinion
25 in any way going to be dependent on the Krop affidavit?

1 MS. VAN WYK: Not except to the extent that it's part
2 of the history he reviewed. He's not relying on his opinion or
3 adopting it.

4 THE COURT: Yeah. I need you to be more specific.
5 So he's going to render an opinion, Blumberg, I'm not going to
6 get this as good as you would, but he's going to say, I
7 assume -- in a sentence or two, what is Blumberg's opinion?

8 MS. VAN WYK: Blumberg's opinion, we asked him two
9 questions. One, whether Mr. Wharton met the criteria for
10 antisocial personality disorder, and the answer to that is no.
11 And two, whether he had made a positive prison adjustment
12 during his time in state prison prior to the 1992 retrial, and
13 the answer to that is yes.

14 THE COURT: So you're telling me when Blumberg is
15 asked what information did you review to reach those
16 conclusions, Blumberg is going to say the Krop affidavit; is
17 that accurate?

18 MS. VAN WYK: That's right.

19 THE COURT: All right. So then if that's something
20 that he reviewed that assisted him in reaching those
21 conclusions that you articulated, do you agree then -- Ms. Van
22 Wyk's been talking here, right?

23 MS. VAN WYK: Yes, Your Honor.

24 THE COURT: I so miss talking to people in person.

25 Ms. Van Wyk, then don't you agree that the attorney

1 general is entitled to know what Krop looked at? And if the
2 answer to that question is yes, why shouldn't you turn over
3 that information?

4 MS. VAN WYK: Well, I guess it's easier to answer
5 those questions backwards, Your Honor.

6 He has been asked. He can't reconstruct what he was
7 given and neither can we. We think it's logical to assume our
8 predecessor counsel gave him the same proffer that was given to
9 the Court back in 1997, but that's all we can say. We have a
10 second declaration from him that has been provided to the AG
11 stating that he diligently searched his files, and there's
12 nothing.

13 THE COURT: What happened in 1997? I forget. Remind
14 me.

15 MS. VAN WYK: Judge Glazer denied an evidentiary
16 hearing after this information had been proffered. So the
17 dispute thereafter was always about whether there was a prima
18 facie case sufficient to entitle Mr. Wharton to a hearing.

19 THE COURT: Who denied it?

20 MS. VAN WYK: Judge Glazer.

21 THE COURT: In state court?

22 MS. VAN WYK: Yes.

23 THE COURT: So as I understand it, Krop was going to
24 testify in the PCRA matter for Mr. Wharton, but a hearing was
25 denied by Judge Glazer.

1 And prior to Krop testifying, was information that he
2 had reviewed turned over to anybody?

3 MS. VAN WYK: The record does not spell that out. I
4 believe all that ever happened was this proffer was made of the
5 records that I just mentioned and his declaration. The hearing
6 was denied, and thereafter it was appealed to the Pennsylvania
7 Supreme Court.

8 THE COURT: Right.

9 MS. VAN WYK: And there wasn't a hearing or other
10 factual developments until the circuit remanded it to this
11 court in 2018.

12 THE COURT: So you're telling me even though it looks
13 like he had materials that he reviewed, and the "he" is Krop,
14 there's no -- you're telling me there's no record that that
15 information was turned over to the DA's Office back in '96.

16 MS. VAN WYK: I imagine they got a copy, but I don't
17 even know -- I mean, it was filed. We have not been able to
18 recover --

19 THE COURT: What was filed?

20 MS. VAN WYK: The proffer was submitted to the Court.

21 THE COURT: What do you mean by proffer?

22 MS. VAN WYK: The proffer consists of the prison
23 records I mentioned.

24 THE COURT: Okay. So records.

25 MS. VAN WYK: Of various times and Dr. Krop's

1 declaration. That was submitted to the Court. The PCRA court
2 issued a notice of intent to dismiss, and they had a chance to
3 respond. And they responded to the proffer saying we thought
4 we were going to get a hearing. This is what we would present
5 at the hearing.

6 THE COURT: Okay. And you're telling me -- I think
7 you already said this, Ms. Van Wyk, but you're saying you've
8 gone back to Krop and asked him to try to resurrect the
9 documents he reviewed, and he said that was a long time ago, I
10 couldn't, but I tried in good faith.

11 MS. VAN WYK: He tried in good faith and he has no
12 independent recollection of the case, and we have been unable
13 to reconstruct what he was sent.

14 THE COURT: Thank you.

15 Mr. Barker, with that representation and
16 understanding that Ms. Van Wyk has said that Krop will not
17 testify, Blumberg will rely in part on Krop's opinion, what is
18 it that you want that you don't have?

19 MR. BARKER: Your Honor, what we don't have is
20 anything that relates to the testing that Dr. Krop supposedly
21 did. What we have here is a PCRA petition that's filed on
22 January 21st of 1997 and a representation by Dr. Krop in his
23 second declaration that he was hired in 1997.

24 So I'm not exactly sure how he managed to interview
25 Mr. Wharton, perform tests that he claims that he did, as well

1 as review all of those records, travel to Pennsylvania for an
2 interview, and do anything in those three weeks.

3 So this is plainly something that was created after
4 the fact and apparently after the PCRA court issued its notice
5 of intention to dismiss, and it's only about three weeks before
6 the dismissal happened. So I want to know how all of this was
7 done and why in the world this opinion would be anything that a
8 psychiatrist now, as well as Ms. Link, would be relying on.

9 THE COURT: Well, let me ask Ms. Van Wyk.

10 When Dr. Blumberg is on the stand and he's asked by
11 Mr. Barker, okay, well, you reviewed a report by Krop, did you
12 review documents that supported that opinion in the report by
13 Krop? Blumberg's answer is going to be no; is that right?

14 MS. VAN WYK: If you mean did you review other
15 materials that have not been turned over, Blumberg will say no.
16 He has no record of test results, and, furthermore,
17 Dr. Blumberg's opinion is independent of Dr. Krop's.

18 THE COURT: Ms. Van Wyk, I just want to -- I
19 interrupted you. I'm sorry. I assume you agree that when --
20 look, Mr. Barker is going to have to make a game-time decision
21 on how forceful and impactful he believes Blumberg's reliance
22 on Krop is going to be, and that's going to be his decision as
23 a trial lawyer.

24 Do you agree that he can fully explore with
25 Blumberg -- to the extent Mr. Barker concludes that Blumberg's

1 reliance on Krop is important, he can fully explore with
2 Blumberg that Blumberg, while he's relying on Krop, never got
3 to see the documents Krop relied on.

4 Do you agree with that?

5 MS. VAN WYK: He can explore with Krop anything --

6 THE COURT: No. He can explore with Blumberg.

7 MS. VAN WYK: I'm sorry. Blumberg.

8 He can explore with Dr. Blumberg anything he was
9 provided to review, and we provided a lot of historical
10 materials, including Dr. Krop's declaration.

11 THE COURT: He can also explore what Blumberg didn't
12 review, right?

13 MS. VAN WYK: Namely, the other materials on which
14 Dr. Krop relied, sure.

15 THE COURT: You know, I think we're a little bit, you
16 know, in the weeds here, which is okay. This is important.

17 Mr. Barker, knowing that you're going to be able to
18 drill down on cross the alleged deficiencies on information
19 that Blumberg didn't review, problem solve for us here.
20 Ms. Van Wyk is telling me she's made a good faith search. I
21 believe her. I mean, we're talking about, you know, a long
22 time ago.

23 What is it you want me to order her to do more than
24 what's already done?

25 MR. BARKER: Your Honor, if this was sort of a

1 preemptive motion, the way that the declaration is worded, and
2 in this instance I'm talking about the second declaration, I
3 can't tell whether counsel for Wharton had any of this
4 documentation because all they said was Dr. Krop doesn't have
5 it. So I'm just doing a preemptive --

6 THE COURT: Oh, if that's your concern, we can solve
7 that right now. We've been talking at a higher level, and it's
8 more basic than that.

9 Ms. Van Wyk, I hear you saying a hundred percent you
10 do not have, nor were you able to obtain, the documents relied
11 upon by Dr. Krop; is that accurate?

12 MS. VAN WYK: Yes, Your Honor.

13 THE COURT: Well, then that's that. She made a good
14 faith effort.

15 Mr. Barker, if you think the effort is deficient,
16 when Blumberg testifies, you can raise that point again.
17 Mr. Barker, you'll be given full -- you'll be given a lot of
18 latitude to explore any deficiencies you believe Blumberg had
19 in his testimony vis-a-vis not reviewing documents you think
20 were important. And those deficiencies that you point out,
21 Mr. Barker, in your cross-examination will go to the weight I
22 will give to Dr. Blumberg's testimony. So that resolves that
23 issue. That's my ruling.

24 Let me just look at my notes as to the next issue.
25 Just give me a second.

1 Mr. George, I apologize. I didn't mean to exclude
2 you. Is there anything you want to add that you think could
3 change my ruling on this issue?

4 MR. GEORGE: No.

5 THE COURT: Okay. All right. Is there anything,
6 Mr. Barker, you want to bring to my attention regarding Defense
7 Expert Link? Remembering, Mr. Barker, I can make rulings as I
8 get more familiar with what the witness is going to say, but
9 are there things that you think are properly resolvable now as
10 it relates to Link?

11 MR. BARKER: No, Your Honor, I don't think there's
12 anything you can't resolve at the time of the hearing with
13 Ms. Link.

14 The only thing that I would say is I don't think that
15 she should be permitted to engage in conjecture about what
16 other prison officials were thinking.

17 THE COURT: Yeah. Well, generally, you correctly
18 cited the rules of evidence, but that's a game-time decision.
19 If Ms. McHugh or Ms. Van Wyk want to go there, maybe they can
20 think of a good reason, but that will be in context. Thanks
21 for flagging that. Just object at the time if you think
22 they're asking improper questions, okay?

23 MR. BARKER: That's fine, Your Honor.

24 THE COURT: Okay. Ms. McHugh and Ms. Van Wyk, is
25 there anything you think I could resolve now -- remember, I can

1 resolve things as the witnesses testify -- that you think are
2 resolvable now in sort of a pretrial conference?

3 Can't hear you. You're totally inaudible whoever is
4 speaking.

5 MS. VAN WYK: I'm sorry. That was Ms. Van Wyk, and I
6 inadvertently turned off my speaker instead of my mute.

7 I don't have anything on the issues that I was going
8 to address.

9 THE COURT: Okay. Ms. Van Wyk, in my experience in
10 the last 11 months, there has to be one technical glitch. I
11 usually take care of that 50 percent of the time by forgetting
12 I'm on mute, but no worries.

13 Okay. So I assume you speak for Ms. McHugh as well.
14 Nothing we can't deal with at the hearing, right?

15 MS. VAN WYK: Your Honor, I'd like to have her speak
16 for herself because we're in different locations.

17 THE COURT: Fine. Sure.

18 MS. MCHUGH: Your Honor, I'm not sure if we raised
19 other motions in limine with respect to the testimony of the
20 victims, but I don't know if you're including that in that
21 question.

22 THE COURT: Yeah. I understand your position. Your
23 position is that -- well, I'll say what I think it is, and
24 then, you know, you can say it better probably.

25 Your position is that the issue in front of me is one

1 of a constitutional ineffective assistance of counsel issue,
2 and what the victims think or they don't think is irrelevant to
3 that issue. And, therefore, their testimony should be
4 precluded.

5 MS. McHUGH: That's correct. And I would also add to
6 that that, you know, just in response to one argument made by
7 the attorney general, which is that somehow we placed this
8 issue before the Court by the original reason, you know, the
9 original situation that happened before this hearing was
10 scheduled, which was whether or not the District Attorney's
11 Office would concede the claim.

12 And we did raise in our motions in limine that there
13 was one additional fact relevant to that discussion, which was
14 that there was a pretrial offer of life, which I presume had
15 been discussed with the family.

16 What the Court wants to make of that in terms of its
17 decision whether to, you know, accept any negotiations or
18 reject it, is we simply provided it as history of the case that
19 we thought the Court should be aware of.

20 But once this hearing starts and testimony is taken
21 on the constitutional issue, you know, whatever the victim's
22 opinion on that aspect was is no longer relevant. It's a moot
23 point. We're discussing a 6th Amendment claim, and, you know,
24 we're not trying to bring that into issue. But we felt that,
25 since the Court's opinion mentioned the sudden change, that we

1 thought we should mention that.

2 But, you know, we will respect the Court's decision
3 on that, and if we're presenting a hearing on the 6th Amendment
4 claim, we're happy to do that. But we do not think that
5 introduces this issue before the Court.

6 THE COURT: Okay. I understand.

7 Mr. Barker, do you want to be heard on this issue?

8 MR. BARKER: Your Honor, I don't really have a whole
9 lot to add to what we put in our response to their motion. The
10 reconsideration for the second time of the Court's decision not
11 to accept the settlement as it was called, you know, remains an
12 issue because the victims have a right to be heard on that
13 issue. And as I said, I think the Court can easily separate
14 that from the ineffectiveness claim.

15 THE COURT: Mr. George, do you want to be heard?

16 MR. GEORGE: Well, I think we've made our position on
17 that clear. I mean, I never would object to the attendance or
18 even the allocution of people who are survivors in a homicide
19 case.

20 I completely agree with the petitioner's point that
21 their opinion cannot be a factor in this Court's decision on
22 the issue that the Third Circuit remanded this case to this
23 Court to decide.

24 THE COURT: Okay. I think we're all in agreement,
25 and I can certainly, once I rule on the issue that I've been

1 directed to rule on by the Third Circuit, I'll say exactly how
2 I am basing my opinion or on what facts or law I'm basing my
3 opinion and what I'm not. I don't want to reach any
4 conclusions now as to how the victim's family's views would
5 factor into that because we haven't developed a record yet.

6 But to be completely transparent, and I think I've
7 said this before so this should come as no surprise to anybody,
8 the issue of the victim's family's acquiescence, or the alleged
9 acquiescence, to the confession made by the DA's Office was
10 inserted in this case by the DA's Office, and we're going to
11 see that through and we're going to see how that plays out.

12 So that resolves that issue. That's sort of a held
13 under advisement issue, and I think that generally addresses a
14 lot of things that we can address before we start teeing things
15 up.

16 I understand -- I hate to be insensitive. I forget
17 which witness now has Covid and is sick.

18 MS. McHUGH: Your Honor, this is Ms. McHugh.

19 Ms. Link, who was slated to testify next week on the
20 18th. I can't say that she has Covid. I'm certainly assuming
21 that based on my brief conversation with her. But she's
22 extremely ill and would not be able to testify next week, and
23 so we would request to substitute Dr. Blumberg. But she cannot
24 testify next week.

25 THE COURT: Okay. So we're going to just start with

1 Blumberg on the 18th. Is that what you're saying?

2 MS. McHUGH: Right. That's correct.

3 MR. BARKER: Your Honor, this is Jim Barker. We have
4 a real problem with that. First of all, we just got his report
5 yesterday, and Dr. O'Brien is not available on the 18th.

6 THE COURT: Why?

7 MR. BARKER: He has a hearing in Blair County. We
8 were told that Dr. Blumberg was going to be testifying on the
9 25th, so we cleared his schedule for the 25th.

10 THE COURT: Why does Dr. O'Brien have to be present?

11 MR. BARKER: He wants to hear Dr. Blumberg's
12 testimony.

13 THE COURT: Because he wants to factor it into his
14 opinion?

15 MR. BARKER: Correct.

16 THE COURT: We're going to have this -- there's so
17 many different variables here.

18 Steve, this is all going to be on the record, right?

19 THE DEPUTY CLERK: Yes, sir.

20 THE COURT: So, Mr. Barker, you know, Ms. Link is
21 sick. So what's going to happen, and I think this is a
22 work-around, I'm going to order the testimony of Blumberg, who
23 is going to testify on the 18th, to be transcribed in an
24 expedited fashion so that your expert, Dr. O'Brien, can have
25 the benefit of reviewing that before he testifies.

1 Does that work?

2 MR. BARKER: Your Honor, part of the problem, too, is
3 that I need Dr. O'Brien's assistance for cross-examination
4 purposes. As I said, I'm still being given, you know, less
5 than a week to prepare cross-examination of the psychiatrist.

6 THE COURT: Well, you can do it. I hear what you're
7 saying. We're going forward with Dr. Blumberg on the 18th.
8 I'll get you the transcript so that Dr. O'Brien can review it.
9 And if you can make a pitch to me, and I'll listen with an open
10 mind, Mr. Barker, that somehow you need to ask more questions
11 of Blumberg because you didn't have O'Brien there, then maybe
12 we'll bring Blumberg back and I'll let you ask further
13 questions. Blumberg's testifying on the 18th with those
14 arrangements made.

15 So what else can I resolve for you folks? I want to
16 say to Ms. McHugh and Ms. Van Wyk, it would be preferable if we
17 can keep the same schedule, but if we can't, that's what we're
18 going to do, okay?

19 MS. McHUGH: Yes, Your Honor. This is Ms. McHugh. I
20 plan to try to touch base with her before the 18th to find out
21 what her condition is so I can inform the Court at that time.

22 THE COURT: The first call you make as to her status
23 is to Mr. Barker, not me, okay?

24 MS. McHUGH: Oh, okay.

25 THE COURT: And in case I wasn't clear on the victim

1 family issue, I think I was, anyone from the victim's family
2 who wants to be heard will be heard.

3 So what else can I do for you folks to get us ready
4 for this hearing?

5 MR. BARKER: Your Honor, the only other issue was
6 that Mr. Cannon told us that he was skeptical of the
7 misconduct, the implements of escape, and that he had sort of
8 changed his opinion on that and that he believes now that he
9 would challenge that because they didn't take photographs of
10 the alleged handcuff key that was improvised by Mr. Wharton.

11 As a result of that, we went out and found two of the
12 corrections officers who were involved in those proceedings,
13 and we would like to call them to the stand because that
14 contradicts the conjecture that apparently Mr. Cannon is
15 relying on Ms. Link for. And our view is that we have two
16 direct witnesses to that, and they're very clear that this was
17 a handcuff key. So we would like to call --

18 THE COURT: We're just going to have to wait and see
19 how things develop. I can't make a decision on -- that's based
20 on what Cannon says and what Link says, and I haven't even
21 heard from either of them. It's a legitimate thought and hold
22 it. I just can't rule on that right now whether those
23 witnesses can testify. And logistically I understand this is a
24 nightmare, but we can just reschedule and make it work. We're
25 all just going to have to be flexible.

1 I want the defense to know, I think the defense,
2 Ms. McHugh and Ms. Van Wyk -- and thank you, Mr. Barker, for
3 bringing that to my attention -- I am completely unfamiliar
4 with the concept of a lawyer who can avail themselves, that is,
5 Mr. Cannon, from traveling out of state insisting to be heard
6 live when most of the litigation world is doing this by Zoom
7 and putting in the request to the federal marshals that they
8 reimburse him for his travel expenses.

9 I am not saying that won't happen, but I want whoever
10 is interfacing with Mr. Cannon, I want you to tell him that I
11 am not blessing that and I'm not preemptively agreeing to it,
12 not because I'm trying to be difficult, but because I just
13 don't know whether it's permissible or not. And I've never had
14 a request like this before. I need to interface with the
15 United States Marshals and see if this is going to be a
16 problem, and I haven't had a chance to do that. So I'm not
17 getting involved in Mr. Cannon's travel arrangements, but I
18 just want everyone to know this is not going to be rubber
19 stamped. And I just don't know how this is going to play out.

20 So I'll try to look into this Tuesday and see. I
21 guess I'll call the marshals and say here's my situation. He's
22 subpoenaed. I suppose the defense is going to subpoena him.
23 So if he's subpoenaed, are you going to pay for his travel
24 arrangements? I'm happy to make that call Tuesday, but in the
25 interim, I just want everyone to know I don't know how this is

1 going to turn out, okay?

2 MS. MCHUGH: I understand, Your Honor. This is
3 Ms. McHugh. I just want to clarify something, that this
4 petition to the marshals is my request because I'm not
5 permitted to pay for his travel to come to court as a fact
6 witness. He's not an expert witness that we're authorized to
7 do that for.

8 In other hearings in the federal system, this is how
9 this has been done. We did not request that the marshals
10 subpoena him simply because he's been a cooperative witness,
11 and I didn't think that was necessary, especially since he was
12 an officer of the court. However, I can, you know, amend that
13 motion to ask them to subpoena, if that's a requirement.

14 I was trying to reach the marshals yesterday to
15 clarify some of these issues. In other cases where we've
16 requested this for fact witnesses, you know, the marshals
17 offices do it in different ways in different jurisdictions, so
18 I was trying to clarify that issue.

19 THE COURT: Okay. Who was just speaking?
20 Ms. McHugh?

21 MS. MCHUGH: Yes, it is.

22 THE COURT: Ms. McHugh, I appreciate that. I'm going
23 to stand down then in the hopes that you can clarify this. And
24 if you can't and you need my intervention, you'll let me know
25 okay?

1 MS. McHUGH: Yes. I will say that the marshals will
2 require an order to do the things, but I'll try to get in touch
3 with them to find out how they prefer to do that.

4 THE COURT: Yeah. And if you need me to sign an
5 order, tell me who I have to interface with and who you've been
6 talking to and all that to make our life easier.

7 MS. McHUGH: I understand. And, Your Honor, if
8 there's one issue that I could address with respect to what
9 Mr. Barker said about the additional corrections officer
10 witnesses, I understand the Court wants to make a decision
11 later after you've heard some of the evidence as to whether
12 their testimony will be necessary.

13 I want to alert the Court that we have not received a
14 statement from these witnesses, and I may have additional
15 motions in limine because, just based on the proffer that was
16 submitted, it appears that a lot of their testimony would be
17 inappropriate for other evidentiary reasons.

18 THE COURT: Understood. Understood. Understood.
19 You're five steps ahead of me. Understood. You won't need to
20 file anything in writing. We can just talk it through, okay?
21 But thank you for the heads-up.

22 MS. McHUGH: Thank you.

23 THE COURT: Okay. Anything else that I can help you
24 folks with in between now and the 18th? If something else
25 comes up, I trust all the lawyers to use their judgment. I

1 don't want to micromanage you, but you have an obligation in
2 Federal Court to meet and confer and try to resolve things on
3 your own. But if you can't resolve them and it would make your
4 life easier for me to step in and give you clarity before the
5 18th, you can email Samantha, my law clerk, and I'll try to
6 help you out so we can have some productive time on the 18th.

7 All right. Thank you, everyone. One at a time.

8 MS. MAHLER: Go ahead, Mr. George.

9 MR. GEORGE: I just wanted to alert the Court that we
10 would like to -- the Commonwealth would like to avail itself of
11 your offer before to participate remotely. I don't know if one
12 or both of us will be present on the 18th, but we will do that
13 remotely with this Court's permission. I just wanted to
14 mention that when Ms. Waimes testifies, if she testifies, it
15 would be our request that she also be permitted to testify
16 remotely.

17 THE COURT: We'll make whatever arrangements we can,
18 Mr. George, to make everyone comfortable.

19 MR. GEORGE: Thank you.

20 THE COURT: Of course.

21 MS. MAHLER: Your Honor, this is Cari Mahler, if I
22 may. Just to confirm we're on the same page for the 18th, the
23 defense is presenting Dr. Blumberg first and actually not Link.
24 I'm only asking because I'm overnighting exhibit binders.

25 THE COURT: My understanding is that the preferable

1 course is that Link testifies if health permits as scheduled.
2 If she can't, we're going to insert Blumberg in on the 18th,
3 and you're going to use your judgment to -- I'm sorry.
4 Mr. Wharton's counsel is going to use their best judgment as to
5 when that decision can be made and alert the lawyers as soon as
6 possible. I prefer to keep the same schedule, but if Link is
7 sick, we're going to go with Blumberg, okay?

8 MS. MAHLER: Okay. Thank you, Your Honor.

9 THE LAW CLERK: Judge, this is Sam. I just wanted to
10 raise one thing that I thought about maybe discussing.
11 Ms. Mahler had asked about some family members beyond those who
12 are going to testify basically wondering if the video link that
13 we provided is available for anyone from the defendant's family
14 to join.

15 THE COURT: You know, even though we're in a Covid
16 situation, this is a public proceeding. I cannot preclude
17 anyone from the public, a person on the street, from
18 participating, and so I'm going to -- I'll talk to Steve, Sam.

19 THE DEPUTY CLERK: Judge, not to cut you off, but I
20 talked to our IT folks right before we got on the phone today
21 at 1:00. What they'll do, we have the link that we sent to
22 counsel, or Sam sent to counsel, I think last week or the week
23 before. What we will do is we will send a second link out for
24 nonparticipants.

25 So that will be a link where they can see what's

1 going on, but their audio will be muted. So they won't be able
2 to speak, but they'll be able to watch everything, you know, as
3 if they were in person. So that's a link that we can send out
4 Tuesday or Wednesday next week. That's for anybody that wants
5 to. Again, that's a nonparticipant. We'll get that out next
6 week.

7 MS. VAN WYK: Your Honor, this is Ms. Van Wyk. I
8 have a related request. Dr. Blumberg has some medical
9 residents who are his students in forensic psychiatry that
10 would like to observe.

11 Could they avail themselves of this same link that
12 Mr. Sonnie will send out?

13 THE COURT: Yeah. The proceeding is open to the
14 public, so yeah.

15 MS. VAN WYK: Thank you.

16 THE DEPUTY CLERK: We'll send it out. We'll
17 highlight the fact that this is a nonparticipant link, and then
18 you folks, as far as I know, you can send that to anybody you
19 want. Whoever they are, they can click into that link and
20 observe the proceedings.

21 MS. VAN WYK: Okay. Thank you very much.

22 THE DEPUTY CLERK: Yeah, sure.

23 THE COURT: Everyone have a nice weekend. Take care.
24 Thanks for your time.

25 (Proceedings adjourned at 2:26 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Shannan Gagliardi 3/16/21

Shannan Gagliardi, RDR, CRR